Supreme Court, U.S.
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No. 97-1919

In The

Supreme Court of the United States

October Term, 1997

BRYAN L. BECKHAM, *et al.*,

Petitioners,

v.

UNION PACIFIC RAILROAD CO., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the statute of limitations on a claim for benefits under ERISA § 502(a)(1)(B) is triggered when a plan participant is notified, clearly and unequivocally, that he or she will not receive certain benefits *and* the plan participant affirmatively relies upon such notice in successfully arguing to the court that any appeal to plan fiduciaries would be futile, or whether, under these circumstances, the limitations period does not begin until the participant makes a formal application for benefits which is denied by the fiduciaries.

LIST OF PARTIES

Petitioners: Respondents do not object to the list of Petitioners in the petition.

Respondents: Respondents do not object to the list of Respondents that appears in the petition, except to note that (1) the Missouri Pacific Railroad Company was merged into the Union Pacific Railroad Company on January 1, 1997; (2) Edwin A. Willis has replaced Ursula F. Fairbairn on the Pension Committee of the Missouri-Kansas-Texas System Pension Plan for Non-Agreement Employees (the "MKT Plan"); and (3) Petitioners have failed to name as Respondents two additional parties in whose favor the Court of Appeals for the Eighth Circuit ruled below, namely the Pension Plan for Salaried Employees of Union Pacific Corporation (the "UP Plan") and the Named Fiduciary-Plan Administration of the UP Plan (the "UP Plan Administrator"). We assume these omissions are a mere oversight since Petitioners have served no notice of an intention to omit these parties. Both the UP Plan and the UP Plan Administrator join in opposing the petition.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Union Pacific Corporation ("UPC") is a publicly-held corporation, with no parent company. There are no nonwholly-owned subsidiaries of UPC.[1]

Missouri Pacific Railroad Company ("MPRR") was merged into Union Pacific Railroad Company ("UPRR") on January 1, 1997. UPC directly and indirectly owns a 100% interest in UPRR. The only nonwholly-owned subsidiary of UPRR is St. Joseph & Grand Island Railway Company.

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[1] Respondents' determination of the corporate filers' nonwholly-owned subsidiaries was based on the Internal Revenue Service Form 851 "Affiliations Schedule" submitted by UPC for the 1997 tax year.

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OPINIONS BELOW

Respondents do not object to Petitioners' statement concerning publication of the opinions below.

JURISDICTION

Respondents do not object to Petitioners' statement concerning the jurisdiction of this Court.

STATUTE INVOLVED

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B):

(a) Persons empowered to bring a civil action.

A civil action may be brought –

(1) by a participant or beneficiary –

. . .

> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

STATEMENT OF THE CASE

1. *The Statutory Scheme.* ERISA Section 502(a), 29 U.S.C. § 1132(a), is a comprehensive provision identifying who may bring a cause of action under ERISA and the types of relief they may seek. The claims at issue here were brought under ERISA § 502(a)(1)(B), which permits

plan participants and beneficiaries to bring civil actions concerning their entitlement to plan benefits. As the language of this provision makes clear, a plan participant or beneficiary is authorized to bring suit not merely for benefits due him but also "to enforce his rights under the terms of the plan" and "to clarify his rights to future benefits under the terms of the plan."

Although Congress enacted a detailed provision setting forth a statute of limitations for claims that allege a breach of fiduciary duty under ERISA,[2] it did not enact a limitations provision for claims under ERISA § 502(a)(1)(B) alleging breaches of the terms of a plan. Accordingly, the courts have followed the practice of "borrowing" a time period from a state statute of limitations and applying the general federal "discovery rule" to determine when the limitations period begins to run.

Petitioners correctly note that ERISA and the regulations thereunder provide that plan participants who have applied for and been denied benefits may appeal that denial to an appropriate named fiduciary of the plan. There is, however, no language in ERISA, in the regulations, or in the legislative history of ERISA suggesting

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[2] This provision appears at ERISA § 413, 29 U.S.C. § 1113. Although Petitioners suggest that a similar rule should be applied in the present case, they have never disputed that Section 413 does not apply to the claims under ERISA § 502(a)(1)(B) at issue here. Petitioners also have failed to contest the district court's dismissal of their separate claims for breach of fiduciary duty for failure to state a claim. *See* Pet. App. 10a ("none of the parties' briefs" submitted to the court of appeals addressed the district court's dismissal of the fiduciary duty claims); Resp. C.A. Reply Br. 14.

that the availability of these plan remedies tolls the running of the applicable statute of limitations.

2. *Facts.* In 1986, the Missouri Pacific Railroad Company ("MPRR"), a subsidiary of Union Pacific Corporation ("UPC"), agreed to acquire substantially all shares of stock in the Missouri-Kansas-Texas Railroad Company ("MKT"). Pet. App. 5a. Prior to the acquisition, both MKT and UPC had traditional, defined benefit pension plans for such of their respective employees as were not covered by a pension plan maintained for employees in a collective bargaining unit. Joint Appendix Filed in the Eighth Circuit ("JA") 225-58 (MKT Plan), 571-696 (UP Plan). Hence, these plans covered what are sometimes called "non-agreement" employees. These two non-agreement plans, which are Respondents in this proceeding, are referred to here as the "MKT Plan" and the "UP Plan."

More than a month before the acquisition of MKT was consummated on August 12, 1988 (the "Acquisition Date"), all MKT non-agreement employees were advised that their jobs with MKT would end on the Acquisition Date. *See* JA 156-59 (Declaration of then-UPRR Director of Personnel Administration Scott Bannister) ("Bannister Declaration"); Pet. App. 5a-6a. Those employees were given a choice: they could either accept a severance offer from MKT and terminate their employment immediately prior to the Acquisition Date, or by declining that offer, they could accept new employment with Union Pacific Railroad Company ("UPRR") and begin to receive UPRR benefits on the Acquisition Date. Pet. App. 5a-6a. Materials explaining this choice were sent to every MKT non-agreement employee in advance of the Acquisition Date,

and informational meetings were held to discuss the terms and conditions of continued employment with UPRR. *See* Pet. App. 6a; JA 156-59 ("Bannister Declaration"); JA 517-61 (Letter from then-MKT Assistant Vice President for Personnel and Director of Labor Relations M. Janovec to "Non-Agreement Employee," dated July 1, 1988, with "Fact Sheets").

There is no dispute that all non-agreement MKT employees, including Petitioners, were notified prior to August 12, 1988 of how their years of employment would count toward pensions from the MKT Plan and the UP Plan. *See* Pet. App. 6a. Specifically, Petitioners were told that as of the Acquisition Date they would "cease to accrue benefits in the [MKT] Plan," JA 36 (Complaint ¶ 32), JA 83 (Amended Answer ¶ 32), and that if they began working for UPRR, they would start to accrue "[c]redited [s]ervice" toward pension benefits under the UP Plan. Pet. App. 6a. They were also expressly told that their prior years of service with MKT, which had already been credited under the MKT Plan, "would not be used to determine accrual of pension benefits under the UP Plan." JA 36 (Complaint ¶ 31), JA 83 (Amended Answer ¶ 31); *see also* Pet. App. 6a; JA 157 (Bannister Declaration).[3]

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[3] Among other things, the fact sheets discussed the example of a hypothetical "[e]mployee 'A' [who] has ten years [of] creditable service with MKT, joins UP and works two years, then retires." The fact sheets explained that "[e]mployee 'A' would receive a pension benefit calculated on ten years of service under the MKT pension program and two years under the UP pension plan." Pet. App. 43a. Petitioners contend that the policy announced in the fact sheets violates the terms of the

3. *The Commencement of Litigation.* On February 2, 1994, counsel for Petitioners wrote a letter to UPC threatening to commence litigation over the failure to count Petitioners' post-acquisition employment with UPRR toward accrual of a pension under the MKT Plan. JA 44-46. UPC referred the letter to the Pension Committee of the MKT Plan ("MKT Plan Committee"), which treated the letter as a request for benefits. Pet. App. 7a. On March 31, 1994, the MKT Plan Committee denied the request for benefits, explaining that Petitioners' post-acquisition employment did not count as "Credited Service" under the terms of the MKT Plan. Pet. App. 7a. Respondents UPC, UPRR, MPRR, and the MKT Plan then filed a complaint for declaratory judgment under ERISA against Petitioners and a defendant class, seeking a determination that the MKT Plan Committee's construction of the MKT Plan should be upheld because it was not arbitrary, capricious, or an abuse of discretion. Pet. App. 8a.

Petitioners counterclaimed pursuant to ERISA § 502(a)(1)(B) naming UPC, the MKT Plan, the MKT Plan Committee, the UP Plan, and the UP Plan Administrator as counterclaim defendants (collectively, the "UP Parties"). Pet. App. 8a. As amended, their counterclaim alleges four causes of action against the UP Parties relating to their refusal to count post-acquisition service as "Credited Service" under the MKT Plan (Counts I-IV), one cause of action against the UP Parties relating to their refusal to count pre-acquisition MKT service as "Credited

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pension plans, and that employee "A" in this example should receive 12 years of credit under the MKT Plan *plus* 12 years of credit under the UP Plan.

Service" under the UP Plan (Count V), and one cause of action against the UP Parties relating to their refusal to count pre-acquisition MKT service as "Credited Service" in a Voluntary Early Retirement Incentive Program ("VERIP") offered as a part of the UP Plan (Count VI). Pet. App. 8a.[4]

4. *Proceedings Below.* Initially, Respondents moved to dismiss or stay Petitioners' benefit claims on the ground that Petitioners had failed to exhaust available administrative remedies under the UP Plan and the MKT Plan. Pet. App. 8a-9a. Respondents argued that Petitioners had not appealed the MKT Plan Committee's denial of benefits and had made no demand for additional credited service under the UP Plan or the VERIP before filing their counterclaims. Petitioners opposed this motion on two principal grounds. First, Petitioners argued that the UP Plan and MKT Plan lacked any language that would make exhaustion of remedies mandatory before they could proceed with litigation. Second, Petitioners argued that exhaustion would be futile, because, in their words:

> Since 1986 . . . [Petitioners] repeatedly have been informed by numerous individuals, including employee benefit department employees and the Chairman and Chief Executive Officer of the

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[4] Certain claims in the counterclaim are not at issue here: Count II and a portion of Count V sought relief for breach of fiduciary duty, but Petitioners did not appeal the district court's dismissal of these claims for failure to state a claim. *See* Pet. 10a n.13. Another claim, Count VII, alleged violations of various ERISA disclosure provisions by the UP Plan Administrator, and is still before the district court. *See* Pet. App. 8a n.11.

> Union Pacific Railroad, that they would not receive any benefit credit under the UP Plan for their MKT service. *At no time has any corporate or UP Plan official indicated that this position would be changed, or even that it was under review.*

Memorandum of Law in Opposition to Motion To Dismiss or To Stay Defendants' Amended Counterclaim ("Pet. D.C. Br.") 15-16 (emphasis added). Petitioners made a similar representation concerning the MKT Plan. Pet. D.C. Br. 15.

The district court accepted Petitioners' arguments and denied the motion to dismiss because the plans did not contain express language requiring exhaustion and because, the court found:

> There is no indication that the position taken by [Respondents] since 1988 and in their complaint would be subject to change if the defendants and counterclaim plaintiffs initiated or participated in an optional administrative review process.

Pet. App. 24a.

On February 26, 1996, Respondents sought summary judgment on statute-of-limitations grounds.[5] Regarding the limitations issue, Respondents pointed out that by Petitioners' own admission, there had been a "clear and continuing repudiation" of their entitlement to additional

[5] Respondents also filed a second motion for summary judgment, based upon the application of a deferential standard of review to the decisions of plan fiduciaries. Because its ruling on the statute-of-limitations issue made it unnecessary to do so, the court of appeals elected not to reach the issues presented on Respondents' cross-appeal from the denial of that motion.

UP Plan and MKT Plan credits since at least the time of the MKT acquisition in 1988, and that this sufficed, under the federal discovery rule, to trigger the applicable statute of limitations. *See, e.g., Miles* v. *New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593 (2d Cir. 1983).[6]

The district court dismissed counterclaim Counts I, III, IV, and a portion of Count V on statute-of-limitations grounds, finding that the applicable five-year statute of limitations provided by Nebraska law commenced no later than August 12, 1988, and that these Counts, filed in July 1994, JA 53-79, were thus time-barred. *See* Pet. App.

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[6] Petitioners' argument, in a footnote, that even if the discovery rule applies, their claims did not accrue in 1988 because there was no "unlawful act" in 1988, Pet. 11 n.6, presents no issue worthy of this Court's consideration. A failure to administer the plans in accordance with their terms by refusing to recognize the accrual of pension credits would clearly have been actionable in 1988 under ERISA § 502(a)(1)(B), which expressly permits plan participants to bring suit *before* benefits are due. Petitioners' argument that the "fact sheets" could not change the plans in 1988 and that a formal plan amendment was required with notice to plan participants only *supports* the lower courts' finding that the violations alleged by Petitioners occurred as of August 12, 1988, precisely because there had been no amendment as of that date.

Petitioners cite an internal UPC memo from February 1989, discussing a proposal to amend the pension plans, to suggest that the 1988 fact sheets should be read as advising Petitioners of *future* plan amendments. *See* Pet. 8 n.3. But the memo did not and could not have influenced the Petitioners in any way, much less lull them into failing to assert their rights, because the Petitioners were unaware of the memo. As Petitioners conceded in briefing before the Eighth Circuit: "The Participants knew none of this." Pet. C.A. Br. 7.

35a-37a. The district court did not, however, dismiss Count VI, relating to the VERIP. *See* Pet. App. 36a-37a. The court of appeals affirmed the dismissals on statute-of-limitations grounds and reversed the district court's failure to dismiss Count VI on this ground as well. *See* Pet. App. 15a-16a, 18a.

In their rulings, both courts relied upon the representations that Petitioners themselves had made in opposing Respondents' motion to compel exhaustion of remedies. The district court found that "the same facts which excused [Petitioners] from exhausting plan remedies" also subjected their claims "to dismissal for failure to comply with [the relevant] statute of limitations." Pet. App. 35a. The court of appeals agreed that "[Petitioners'] argument that exhaustion of remedies would be futile . . . supports th[e] conclusion" that their cause of action accrued in August 1988. Pet. App. 16a n.14.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied because: (1) the supposed split among the circuits concerning the "discovery rule" does not in fact exist, (2) the issue presented by the petition for certiorari is premised on an incomplete and misleading account of the facts and decisions below, and (3) Petitioners' arguments concerning the language of ERISA and appropriate pension plan policy are arguments on the merits that do not justify granting the petition.

I. THE EIGHTH CIRCUIT'S RULING DOES NOT CONFLICT WITH THE RULING OF ANY OTHER CIRCUIT COURT.

The court of appeals correctly held that the "discovery rule" – according to which "a plaintiff's cause of action accrues when he discovers, or with due diligence should have discovered, the injury that is the basis of the litigation" – applies to the claims under ERISA § 502(a)(1)(B) presented in this case. Pet. App. 12a. Application of the discovery rule is settled law in federal question cases in which Congress has not provided a different accrual rule.[7] What the Eighth Circuit recognized, but Petitioners fail to acknowledge, is that the discovery rule is entirely *consistent* with those cases holding that the denial of an application for benefits at retirement will trigger the running of the statute of limitations. After all, once "a claim for benefits has been formally denied[,] . . . a beneficiary cannot successfully argue that he was unaware of an injury." Pet. App. 12a-13a.

If the denial of an application for benefits at retirement will suffice to trigger the statute of limitations, does this mean that *only* such a denial will suffice for that purpose? The answer is clearly no. The statute of limitations may be triggered in advance of a formal application for benefits *if* there has been "a clear and unequivocal repudiation of rights under the pension plan which has been made known to the beneficiary." *Daill* v. *Sheet Metal*

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[7] *See, e.g.*, *Connors* v. *Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991) ("At least eight federal courts of appeals have, within the last four years, agreed . . . that the discovery rule is the general accrual rule in federal courts.").

Workers' Local 73 Pension Fund, 100 F.3d 62, 66, 67 (7th Cir. 1996).

The Eighth Circuit is simply one of several courts that has had occasion to apply the discovery rule in circumstances where a participant's entitlement to benefits was repudiated before the submission of an application for benefits. *See, e.g., Daill*, 100 F.3d at 66, 67 (plaintiff's claim accrued when plan fiduciaries calculated his pension credits and "unequivocally informed" him of results, and not when he subsequently applied for, and was denied, benefits); *Pisciotta* v. *Teledyne Indus., Inc.*, 91 F.3d 1326, 1331-32 (9th Cir. 1996) (a claim concerning an allegedly improper "freeze" of plan benefits accrued when the plaintiff was informed of the freeze); *Miles* v. *New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 598-99 (2d Cir. 1983) (the statute of limitations accrues when there is a "repudiation by the fiduciary" which is "*clear* and made known to the beneficiaries," but on the particular facts presented, the district court was within its discretion in finding that communications in advance of an application for benefits were not sufficiently clear); *Turner* v. *Retirement Plan of Marathon Oil Co.*, 659 F. Supp. 534, 539 (N.D. Ohio 1987) (claim for service credits under pension plan accrued "when plaintiff knew the effect of the Plan upon his hourly service" rather than when his application for benefits was formally denied at retirement), *aff'd mem.*, 845 F.2d 327 (6th Cir. 1988).

Petitioners' contention that eight circuit courts have rejected the "discovery rule" in the context of claims under ERISA § 502(a)(1)(B) is baseless. Only two of the cases cited by Petitioners had any occasion to rule on an

argument that notices received prior to a denial of benefits at retirement, and after the effective date of ERISA, might trigger the statute of limitations. They are the *Daill* and *Miles* decisions, described above, which applied the same test applied by the Eighth Circuit: whether there had been a "clear" and "unequivocal" repudiation by a plan fiduciary of the participant's right to benefits, made known to the participant.

None of the remaining statute-of-limitations cases cited by Petitioners conflict with the holding of the Eighth Circuit below. *Jenkins* v. *Local 705 Int'l Brotherhood of Teamsters Pension Plan*, 713 F.2d 247, 253-54 (7th Cir. 1983), held that a cause of action "arose when the trustees of the pension plan denied applicant's benefit application" and not four years later when the appellant finished exhausting administrative remedies. The *Jenkins* court, however, had no occasion to decide whether events prior to the first formal denial of benefits could trigger the statute of limitations. In *Tolle* v. *Carroll Touch, Inc.*, 977 F.2d 1129, 1137 (7th Cir. 1992), the district court had "treated . . . [the] complaint as only raising a claim under Section 510 of ERISA, [and] did not discuss whether the statute of limitations bar[red] [the participant's] Section 502(a)(1)(B) claim." Although the Seventh Circuit stated that a claim under § 502(a)(1)(B) was triggered by a formal denial of benefits, 977 F.2d at 1139, the court was not confronted with the issue of whether an earlier clear and unequivocal notice regarding benefits might trigger the statute of limitations.

Two other cases cited by Petitioners, *Simmons* v. *Wilcox*, 911 F.2d 1077, 1081 (5th Cir. 1990), and *Held* v. *Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197,

1205-06 (10th Cir. 1990), held that plaintiffs were required to exhaust plan remedies before proceeding in federal court, and that absent such exhaustion, their claims could not be said to have accrued for purposes of the statute of limitations. In neither case, however, did the court have occasion to consider whether a clear and unequivocal notice received in advance of retirement might have triggered the statute of limitations. *Simmons* and *Held* pose no conflict whatsoever with the case at bar, in which the plan participants *successfully* argued that they need not exhaust the plan remedies because (1) there was no language in the pension plans that required them to exhaust administrative remedies before proceeding in court and (2) notices predating the MKT acquisition made it clear how Petitioners' benefits would be calculated and rendered exhaustion of remedies futile. Indeed, both the district court and the court of appeals emphasized below that the very facts that rendered exhaustion of remedies futile also demonstrated that Petitioners' claims under Section 502(a)(1)(B) accrued for limitations purposes no later than August 12, 1988. *See infra* note 11.[8]

Finally, Petitioners rely upon a series of cases that concern the interpretation and application of ERISA § 514(b)(1), 29 U.S.C. § 1144(b)(1), a preemption provision which states that ERISA "shall not apply with respect to any cause of action which arose, or any act or omission

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[8] Where exhaustion is futile, an ERISA beneficiary's claim "accrues at the time at which it became futile to apply for benefits, because . . . at that time there was a de facto denial of [the beneficiary's] claim." *Barnett* v. *International Bus. Machs. Corp.*, 885 F. Supp. 581, 591 (S.D.N.Y. 1995) (cited in opinion below; *see* Pet. App. 16a n.14).

which occurred, before January 1, 1975" (the effective date of the statute). *Id.*; *see Stevens* v. *Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 449-55 (6th Cir. 1992); *Rodriguez* v. *MEBA Pension Trust*, 872 F.2d 69, 72-73 (4th Cir. 1989); *Menhorn* v. *Firestone Tire and Rubber Co.*, 738 F.2d 1496, 1501-03 (9th Cir. 1984); *Quinn* v. *Country Club Soda Co.*, 639 F.2d 838, 840-41 (1st Cir. 1981); *Paris* v. *Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 361 (5th Cir. 1981). Because all of the notices and actions at issue in the present case took place in 1986 or later, the interpretation of ERISA § 514(b)(1) has no bearing on the present dispute.

Moreover, in relying upon discussions of when a cause of action arises for purposes of Section 514(b)(1), Petitioners ignore not only the different statutory provision at issue, but also the very different factual issues and policy considerations presented by claims that appear to straddle ERISA's "effective date." It is one thing to hold, in the context of a dispute that pre-dates the effective date of ERISA, that a plaintiff who could not possibly sue under ERISA before January 1, 1975 – because ERISA did not yet exist – may bring a cause of action under ERISA when his benefits are formally denied after January 1, 1975. *See Rodriguez*, 872 F.2d at 72 (court sought to effect "congressional intent 'to extend the protections of ERISA . . . as soon as practicable' . . . so as to 'provid[e] . . . ready access to the Federal courts' " and to construe narrowly ERISA's preemption provisions) (citations omitted).[9] It is quite another matter to hold, in a

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[9] Petitioners' implicit suggestion that *Rodriguez* held that a claim under ERISA § 502(a)(1)(B) can never accrue, for statute-

case such as the one at bar, that a plan participant who is unequivocally told *after* the effective date of ERISA that he will not receive certain benefits may then choose to ignore that notice and not bring suit under ERISA until retirement, when he would then go through the motions of "requesting" benefits he has known for years would be denied.[10]

In short, Petitioners cite *no* case that conflicts with the general proposition that the federal "discovery" rule is the rule that determines when the statute of limitations is triggered on a claim under ERISA § 502(a)(1)(B). Nor have Petitioners cited any case that conflicts with the Eighth Circuit's particular application of that rule, finding that the limitations period began when participants received clear and unequivocal notices informing them

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of-limitations purposes, prior to a formal denial of benefits, *see* Pet. 17-18, is also undercut by subsequent Fourth Circuit elaboration upon *Rodriguez*. *See Cotter* v. *Eastern Conference of Teamsters Retirement Plan*, 898 F.2d 424, 428-29 (4th Cir. 1990) (analyzing *Rodriguez* and concluding that "some event other than a denial of a claim [for benefits]" could trigger the statute of limitations).

[10] In fact, even the decisions under ERISA § 514(b)(1) show sensitivity to this problem, but address it in the course of interpreting the "act or omission" language of Section 514(b)(1), rather than the "cause of action" language. *See Menhorn*, 738 F.2d at 1501 (holding that ERISA would not apply where a "post-effective date formal denial is the inevitable result of unequivocal pre-effective date interpretations of or exercises of discretion under the plan"); *Quinn*, 639 F.2d at 840-41 (holding that ERISA would not govern a post-effective date denial of benefits where the denial was the "inexorable consequence[ ]" of numerous pre-effective date communications stating that plaintiff was excluded from participation in the plan).

that they would not receive the benefits at issue here and rendering futile the exhaustion of plan remedies.

II. THE PETITION FOR CERTIORARI IS PREMISED ON AN INCOMPLETE AND MISLEADING ACCOUNT OF THE FACTS AND DECISIONS BELOW.

The petition states the question presented as "[w]hether . . . participants' claims for benefits accrue for statute of limitations purposes when they are told about an event which might affect their rights in the future, or when their claims are [formally] denied by a plan fiduciary. . . . " Pet. i. The courts below did not hold, however, that the statute of limitations is triggered when participants are "told" about an "event that might affect their rights in the future." To the contrary, both the district court and the Eighth Circuit ruled that the statute of limitations was triggered by notices sent to each class member which, *by Petitioners' own admission*, clearly and unequivocally informed them of how their benefits would be calculated from August 12, 1988 forward.

The petition fails to disclose the key factual premise on which the Eighth Circuit's decision rests. That factual basis is Petitioners' own representation to the district court, when opposing Respondents' motion to require exhaustion of remedies, that starting as early as 1986, there had been a clear and continuing repudiation of their entitlement to the benefits at issue in this case.[11]

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[11] *See* Pet. App. 16a n.14 (court below: "The claimants' argument that exhaustion of remedies would be futile in this case supports [the] conclusion" that the cause of action accrued

Although Petitioners later attempted to characterize the "fact sheets" and other communications received prior to the MKT acquisition as equivocal, the Eighth Circuit rejected this notion, pointedly observing:

> The claimants have averred that '[s]ince 1986 . . . [the claimants] repeatedly have been informed by numerous individuals, including employee benefit department employees and the Chairman and Chief Executive Officer of the Union Pacific Railroad, that they would not receive any benefit credit under the UP Plan for their MKT service. *At no time has any corporate or UP Plan official indicated that this position would be changed, or even that it was under review.*'

Pet. App. 14a (quoting Pet. D.C. Br. 15) (emphasis added).[12]

The court of appeals also took note of the fact that, even in response to Respondents' motion for summary judgment, Petitioners submitted the affidavit of a class representative who clearly admitted that the Petitioners knew of their injury at the time of the MKT acquisition:

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in August 1988); Pet. App. 35a (district court opinion on statute of limitations: "the same facts which excused [Petitioners] from exhausting plan remedies . . . also subject [the claims at issue] to dismissal for failure to comply with [the relevant] statute of limitations").

[12] Similar representations were also made concerning the repudiation of Petitioners' rights under the MKT Plan. *See* Pet. D.C. Br. 15. It should be noted that at no time in either the district court or the court of appeals did Petitioners ever attempt to explain these representations or reconcile them with the contradictory position taken in opposing Respondents' statute-of-limitations motion.

> [I]n or about August 1988, various corporate representatives of the Union Pacific Railroad informed me and other class members that after the UP/MKT merger, we would cease earning Credited Service under the MKT Plan, and that we would not receive Credited Service under the UP Plan for our MKT employment. . . . *At that time, . . . we thought we were being treated unfairly.*

Pet. App. 14a (citing affidavit by Petitioner Witte; emphasis added).

Wholly ignoring the lower courts' reliance on these binding factual representations, Petitioners attempt to reargue the facts in their Petition, claiming that the notice they received prior to the MKT acquisition was equivocal because one paragraph in the fact sheets said that some answers to questions might not apply to all MKT subsidiaries and that the plan documents were in all instances to be the governing documents. Pet. 6, 15-16. Petitioners neglect, however, to inform this Court that they failed to cite (let alone quote) this supposedly critical paragraph in *any* of their briefs to the Eighth Circuit *or* in their opposition to summary judgment in the district court.[13]

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[13] The cited language is, in any event, inconsequential. It is *always* the case that "official plan documents" are controlling, even when a claim for benefits is "formally" denied. The question posed in 1988 was the same question Petitioners sought to pursue with their counterclaims in July 1994: whether they had been denied pension credits to which they were entitled under the terms of the plans, which were the governing documents.

Are Petitioners asking this court to review the factual issue of whether they received clear and unequivocal notice prior to the acquisition of MKT in August 1988? If so, that is not an issue appropriate for review on certiorari, and the petition should be denied. *See, e.g.*, Sup. Ct. R. 10; *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973). Alternatively, are Petitioners instead asking the Court to decide whether a hedged or equivocal notice may start the statute of limitations running? If so, the petition should again be denied, because that is not the rule of law applied by the lower court. *See* Sup. Ct. R. 10.

III. POINTS II AND III IN THE PETITION CONSIST SOLELY OF ARGUMENTS ON THE MERITS AND DO NOT JUSTIFY A GRANT OF CERTIORARI.

Petitioners' second and third points (Pet. 15-19) represent arguments on the merits and do not constitute reasons for granting the writ. Sup. Ct. R. 10. If the objective of those contentions is to show a significant departure from the accepted and usual course of judicial proceedings, as that phrase is used in Rule 10(a), the contentions fall far short of the mark.

A. The Ruling Below Is Consistent with ERISA's Statutory Provisions.

Petitioners contend that reliance on the "discovery rule" is inconsistent with ERISA's statutory provisions, arguing that claims under ERISA § 502(a)(1)(B) cannot accrue, for purposes of the statute of limitations, until: (1)

a plan participant makes a formal application for benefits and (2) pension plan fiduciaries issue a written opinion that provides specific citations to the plan provisions upon which they rely in denying benefits. *See* Pet. 16. No court, however, has ever held that ERISA provides for such a rule governing the accrual of claims for purposes of the statute of limitations, and with good reason.

As an initial matter, there is absolutely nothing in the language or the legislative history of ERISA to suggest that Congress, when requiring ERISA plans to offer a procedure for challenging claims denials, meant to adopt a rule that would govern when the statute of limitations is triggered for actions brought under ERISA § 502(a)(1)(B). Indeed, Petitioners' argument contradicts the text of ERISA § 502(a)(1)(B), which clearly authorizes plan participants to bring actions to enforce or to clarify their rights to benefits *before* actually applying for benefits.[14] Petitioners also find no solace in the legislative history of ERISA.

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[14] The text of Section 502(a)(1)(B) distinguishes this case from *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 118 S. Ct. 542 (1997), which was brought to the Eighth Circuit's attention below. *Bay Area Laundry* concerned the application of a statutorily-specified limitations period and accrual rule found in the Multiemployer Pension Plan Amendments Act of 1980, in circumstances where Congress had failed to provide any "complete and present cause of action" to plan trustees until a withdrawing employer defaulted on its payments to the plan. 118 S. Ct. at 546. ERISA § 502(a)(1)(B), in contrast, provided claimants with a "complete and present cause of action" when they received notice in 1988 that they would not receive certain benefits under the UP and MKT Plans.

Petitioners' argument that the "factual underpinnings" of their claims were not present in 1988 is specious. Pet. 15-16 n.8.

At bottom, Petitioners are suggesting that Congress meant to provide a rule for claims under ERISA § 502(a)(1)(B) that departs from the usual discovery rule, but failed to do so expressly. It is clear, however, that when Congress wanted to adopt a heightened standard for the accrual of a statute of limitations, it did so expressly – as in ERISA § 413, a limitations provision that applies only to claims for breach of fiduciary duty.[15] Petitioners' argument is tantamount to proposing that the Court provide remedies not expressly sanctioned by Congress – a step this Court has consistently refused to take. *See, e.g., Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 259 (1993) ("The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute."); *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985) (section 502(a) provisions "provide strong evidence that *Congress did not intend to authorize other remedies that it simply forgot to incorporate*

The notices they received in 1988 did not say that former MKT employees would not get combined credited service under both plans if and when UPC got around to amending the plans to prevent such "double dipping." Rather, Petitioners were told unequivocally that they would cease accruing MKT Plan benefits as of August 12, 1988 and would not receive credited service under the UP Plan for their years of prior service with MKT. *See* JA 36 (Complaint ¶ 32), JA 83 (Amended Answer ¶ 32). The suggestion that UP needed "to follow through on its intention," Pet. 15-16 n.8, ignores the unequivocal and *immediate* effect of the notices on the calculation of Petitioners' service credits.

[15] No claims for breach of fiduciary duty are before the Court in this case. *See supra* notes 2, 4.

expressly. . . . We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA.") (emphasis added).

Finally, even if Petitioners were correct in contending that a conflict exists between the "discovery rule" and ERISA's provisions concerning administrative procedures on claims for benefits, this case does not present the proper vehicle for examining the claimed conflict. When confronted in district court with the argument that they were required to exhaust administrative remedies, Petitioners *prevailed* in arguing that (1) notwithstanding the claims review procedures required by ERISA, there existed no requirement under the particular pension plans at issue that Petitioners exhaust administrative remedies before filing suit in district court; and (2) even if exhaustion of such remedies was ordinarily required, exhaustion would be futile, and should not be required, given that notices received prior to the acquisition of MKT made it clear that Petitioners would not receive the benefits at issue in this case. Pet. D.C. Br. 7-17. The suggestion that no claim under ERISA § 502(a)(1)(B) can ever accrue absent a formal application for benefits and exhaustion of remedies is directly contrary to arguments successfully made by the Petitioners below.

B. The Ruling Below Is Consistent with Sound Pension Policy.

Petitioners contend that their proposed rule, deferring the start of the statute of limitations until pension plan participants decide to retire, would serve the policy goal of ease and certainty of administration. Pet. 18. In

fact, however, allowing pension plan participants to wait decades before challenging decisions of plan fiduciaries would disrupt the settled expectations of retirees. Pension plans are funded on a long-term, prospective basis. If causes of action concerning the accrual of pension credits are allowed to remain dormant for decades, until each of the participants affected by a clearly-announced policy retires, challenges to the operation of the plan may arise when it is too late to ensure adequate funding of *all* participants' benefits. Thus, an effective statute of limitations is necessary to protect the expectations of plan participants. *See Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 452-53 (7th Cir. 1990) ("Statutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. They protect important social interests in certainty, accuracy, and repose.").

Adopting the method suggested by Petitioners to determine the accrual of statutes of limitations would have additional dire consequences. It would create a perverse incentive for employees to delay bringing suit until retirement, in the hope of racking up additional claims to benefits, despite having been clearly notified of how their benefits would be determined.[16] It also would substantially increase the possibility that the documentary evidence accompanying challenges to fiduciaries' actions would not be available decades after its creation. Finally,

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[16] *Cf. Cada*, 920 F.2d at 453 ("The statute of limitations is short in age discrimination cases as in most employment cases because delay in the bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlement.").

it would hinder what this Court has recognized to be a principal goal of ERISA – to ensure the solvency of pension plans. *See Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996) ("ERISA tries to 'make as certain as possible that pension fund assets [will] be adequate' to meet expected benefits payments.") (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980)).[17]

Petitioners' policy arguments, warning of "piecemeal challenges" and participants "hav[ing] the burden of parsing through each non-fiduciary communication . . . and quickly filing a lawsuit," Pet. at 12, 18, concern problems that are simply not presented in this case.[18] Petitioners accepted jobs with UPRR after being put on express notice that they would not receive the double service credits they now seek. *See* Pet. App. 42a-45a ("Fact Sheet C," Q & A 9, 11). Each Petitioner had to make an individual choice whether to work for UPRR under those terms and conditions or to accept a severance

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[17] "One of Congress' central purposes" in enacting ERISA "was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman*, 446 U.S. at 374-75 and n.22 (noting that at least 19,000 workers lost vested benefits in the previous year "because of the termination of insufficiently funded plans" and citing in particular the example of the Studebaker company, where 4,500 workers lost 85 percent of their vested benefits).

[18] It is telling that in purporting to demonstrate that Respondents' actions (and by implication, the holding of the court below) were "unfair," Petitioners look far afield to a case involving forfeiture under "bad boy" clauses which provide for the disqualification of benefits upon a participant's felony convictions or dishonest actions. *See Winer* v. *Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979) (cited at Pet. 18 n.10).

buyout from MKT; and each was clearly told, with examples, that their MKT service would count for benefit calculation purposes only under the MKT Plan and their UP service would count only for purposes of the UP Plan. *See* Pet App. 42a-45a. This was in no sense a notice that Petitioners would or could justifiably ignore until retirement. Indeed, Petitioners offered the affidavit of a class representative who acknowledged that he, and his peers, upon receiving the notice in 1988, felt at the time that they were being treated "unfairly." Accordingly, the court below did *not* hold that plan participants must bring suit with respect to ambiguous employer statements, but rather that where, as here, plan participants receive an admittedly clear notice in advance of retirement, the limitations period commences upon the notice.[19]

For this Court to grant Petitioners the relief they seek, it would be necessary to hold that no matter how clear and unequivocal a fiduciary's repudiation of plan participants' entitlement to benefits, those participants would still have the right to ignore the notice, and wait years, perhaps decades, before filing a formal application for benefits that would trigger the running of the limitations period. Nothing in ERISA remotely suggests that

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[19] The concern that prompted the Department of Labor to file as amicus below – that participants would be forced to "protect themselves by filing premature court actions based on ambiguous employer statements," Pet. 11 n.5 – is simply not presented by the Eighth Circuit's ruling. Indeed, this question was never properly at issue below, since Petitioners *waived* the argument that UP's communications were ambiguous when they induced the district court to rely upon their contrary representations.

Congress intended to completely undermine any effective statute of limitations in this manner, and no lower court has held this to be the case. Accordingly, there is no basis for Petitioners' request that the Court legislate a waiver of the traditional discovery rule, eliminating repose and injecting tremendous uncertainty into the management of pension plans nationwide.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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